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LaTRIESTE RESTAURANT & CABARET, INC. d/b/a THE DIAMOND CLUB,

*Petitioner,*

- against -

VILLAGE OF PORT CHESTER, et al.,

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Second Circuit properly reversed the limited declaratory judgment that the Village selectively enforced the 10:00 p.m. restriction from May 1993 until the late summer of 1993 where plaintiff failed to demonstrate that it was selectively treated as compared to similarly situated entities?

Whether the Second Circuit properly upheld the denial of petitioner's application for attorney's fees pursuant to 42 U.S.C. sec. 1988 where plaintiff was not a "prevailing party"?

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## OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, rendered by Magistrate Judge Fox on July 22, 1998, is not officially reported, but is reported in the appendix hereto, (1a) infra.

## STATEMENT OF THE CASE

### A. The Bench Trial

At the bench trial held before Hon. Magistrate Mark D. Fox, the central issue was whether the Village had selectively enforced the 10:00 p.m. time restriction in violation of The Diamond Club's Equal Protection Rights.[1]

Magistrate Judge Fox, as the trier-of-fact, determined that "The Diamond Club's proof at trial was not sufficient to establish by a preponderance of the evidence that the Village had knowledge of violations of the 10:00 p.m. restriction by... prior occupants of the premises," i.e., those entities "similarly situated", (App. 14). Petitioner did not challenge that finding on appeal.

Even though Judge Fox found that the Town had no knowledge of prior violations by those entities "similarly situated" he still, determined that the Village, through its

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[1] Petitioner advised Magistrate Fox at trial that he was not claiming that any other conduct, such as sign violations, fire inspections, and reporting of violations to the State Liquor Authority constituted selective enforcement, (App.2). In addition, Magistrate Fox determined that the Village preferred reasonable explanations for its conduct and that plaintiff failed to provide sufficient evidence to demonstrate that any such conduct was done with intent to inhibit or punish protected speech, (App.22).

Mayor at the time, selectively enforced the 10:00 p.m. restriction from May, 1993 to the late summer of 1993. (App. 24). Judge Fox further found that petitioner had failed to demonstrate an intent to discriminate on the part of any other Village official, besides the Mayor, or any selective enforcement of the 10:00 p.m. restriction by the Village after the late summer of 1993, (App. 22,24). Petitioner did not challenge either of these findings on appeal.

After the decision was rendered by the Magistrate Judge, by Memorandum Order dated July 22, 1998, the Court denied that application. Petitioner applied to the District Court for an award of attorney's fees pursuant to 42 U.S.C. sec. 1988. That application was denied in its entirety based on petitioner not being a "prevailing party" as required under sec. 1988, (App. 49).

**B. The Appeals**

Respondents appealed from that portion of the Decision which found that the Village engaged in selective enforcement from the period of May 1993 to the late summer of 1993.

Petitioner cross-appealed solely from the July 22, 1998 Memorandum Order which denied petitioner's application for attorney's fees.

**C. The Second Circuit Ruling**

On Appeal from the bench trial, the district court's findings of fact were reviewed by the Second Circuit for clear error and its conclusions of law were reviewed de novo. See *Lopresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997) (App. 7).

By Decision dated August 11, 1999 the Second Circuit reversed the limited declaratory judgment in favor of petitioner and affirmed the denial of petitioner's application for attorney's fees. (App. 1).

In reviewing the District Court's finding of selective enforcement, the Second Circuit followed the well-established test in the Second Circuit. That test was set forth as follows (App. 7):

> "In order to establish a violation of equal protection based on selective enforcement, the plaintiff must ordinarily show (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as ... intent to inhibit or punish the exercise of constitutional rights." *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 15-17 (2d Cir. 1999) (quotations and citations omitted), (App. 7).

In applying this test, the Second Circuit concluded that petitioner failed to establish the first element of its selective enforcement claim that the Village selectively treated the Diamond Club when compared to "similarly situated" establishments, (App. 8).

In reaching this conclusion, the Court made clear that under the test in the Second Circuit, knowledge of other violations is not required in every case. (App. 8). However, the Court determined <u>that under the specific facts of this case</u>, petitioner failed to provide proof supporting any alternative theory of selective treatment wherein knowledge is not required. (App. 8). As stated by the Court:

> A petitioner generally must satisfy both elements to establish a claim of selective enforcement, see *Zahra v. Town of Southold,* 48 F.3d 674, 684 (2d Cir. 1995), and knowledge is ordinarily required to establish the first element. We do not hold that knowledge will be required in every case. It is conceivable that selective treatment could be shown where, for example, proof was offered that a municipality did not know of prior violations because it adhered to a see-no-evil policy of not enforcing an ordinance, and then abandoned that policy with respect to a violator engaged in protected activity. In this case, however, LaTrieste has not explicitly called our attention to proof supporting this, or any other such alternative theory of selective treatment. Accordingly, any such alternative arguments are waived. (emphasis added). See *Norton v. Sam's Club,* 145 F.3d 114, 177 (2d Cir. 1998), (App. 8).

Based on the unchallenged finding that the Village did not know of any prior violations of the 10:00 p.m. restriction and on petitioner's failure to point to any alternative proof of discriminatory enforcement, the Second Circuit determined that the Magistrate Judge's conclusion that the Village selectively treated similarly situated entities could not stand, (App. 9).

## REASON FOR DENYING THE WRIT

No basis for granting the instant petition exists in this case. The Second Circuit's Decision that petitioner failed to make out a selective enforcement claim was based on petitioner's failure to sufficiently support its contention that

it was selectively treated when compared to similarly situated entities.

On appeal, petitioner did not challenge the Magistrate Judge's finding that the Village did not know about other violations of the 10:00 p.m. restriction. Petitioner also failed to point to any alternative proof of discriminatory enforcement. Absent such proof, the Second Circuit properly determined that petitioner failed to establish the first element of its selective enforcement claim - that the Diamond Club was selectively treated when compared to similarly situated establishments.

The Second Circuit's Decision was in no way "novel" or "dubious" as asserted by petitioner. To the contrary, the Decision simply follows the well-settled rule in the Second Circuit, that a petitioner must demonstrate that he was selectively treated compared with others similarly situated in order to establish a violation of equal protection based on selective enforcement. See *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 15-17 (2d Cir. 1999); *Le Clair v. Saunders*, 627 F.2d 606 (2d Cir. 1980). The reversal by the Second Circuit of the finding of selective enforcement was based on petitioner's failure to demonstrate such selective treatment.

By this petition, petitioner is simply attempting to circumvent the Second Circuit's finding that plaintiff failed to prove that it was selectively treated. In so doing, petitioner essentially argues that it does not have to show that it was selectively treated as compared to similarly situated establishments in order to prove selective enforcement in violation of the Equal Protection Clause. This position itself is "dubious" as it flies directly in the face of well-established precedent that requires proof of selective treatment in order for selective enforcement to be proper. As stated by the

Supreme Court and cited by the Second Circuit below "Selective prosecution implies that a selection has taken place." *United States v. Armstrong*, 517 U.S. 456, 469, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). No such selection has been shown here. Petitioner also provides no case law in support of such an alleged "exception" to the well settled rule governing selective enforcement cases.

It is also noted that petitioner never took the position below that a "harassment exception" to a normal "selective enforcement" claim should be found. To the contrary, petitioner's position below, as stated by the Second Circuit, was "that selective treatment is established simply by demonstrating that the zoning restriction was not enforced against the Diamond Club's predecessor's and this, without regard to whether the Village knew about the other violations." (App. 9). Petitioner's position on this petition, that a "harassment exception" should have been found, was not raised below and is argued for the first time to this Court. Since petitioner did not argue a "harassment exception" below, any such argument was waived and should not be considered herein.

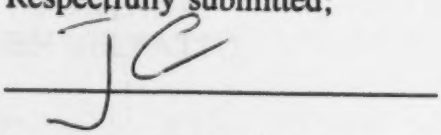
Finally, the petition should be denied because petitioner's claim that the Village orchestrated a series of harassing techniques directed solely at the prospective or ongoing "topless dancing" was found by the Magistrate Judge in his decision, not to have been proven. The Magistrate Judge specifically determined that the Village offered reasonable explanations for most of its conduct and that petitioner failed to provide evidence that the treatment afforded the Diamond Club concerning code violations anomalous, (App. 21-22). Petitioner also failed to demonstrate that the Village Officers who enforced the building code violations acted with discriminatory intent, (App. 23-24). Petitioner did not appeal any of these

findings. There was also no proof at trial concerning the Village allegedly "organizing public picket lines to block the entrance of the Diamond Club" as asserted in the petition. Since petitioner failed to prove its claim that a "series of harassing techniques" was undertaken, its claim that a "harassment exception" should have been created is without merit.

## CONCLUSION

FOR THE FOREGOING REASONS, the Petitioner for Writ of Certiorari should be denied.

Respectfully submitted;



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LATRIESTE RESTAURANT AND
CABARET, INC.,
d/b/a THE DIAMOND CLUB,

Plaintiff,

- against -

MEMORANDUM ORDER
94 CIV 0252 (BDP)(MDF)

THE VILLAGE OF PORT CHESTER,
JOHN BRANCA, ANTHONY FONTANA,
CARL VERRASTRO and JOHN BELFATTO,

Defendants

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MARK D. FOX, United States Magistrate Judge

The parties consented to trial before me pursuant to 28 U,S.C. §636(c) on October 17, 1996. After a bench trial, I rendered a decision on January 23, 1998. LaTrieste Restaurant and Cabaret, Inc. ("LaTrieste"), through its attorneys, the law firm of Tashjian & Padian, has applied for attorneys' fees in the amount of $214,761.02.[1] For the reasons that follow, the application for attorneys' fees is denied.

LaTrieste, which operates a topless cabaret called the Diamond Club at 140 Midland Avenue in the Village of Port

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[1] Plaintiff originally requested $267,205.12 in attorneys' fees but, in its reply papers, decreased the amount of the application in response to certain arguments made by Defendant

Chester ("Village"), brought this action pursuant to 42 U.S.C. §1983, alleging that the Village selectively enforced a use restriction on the premises in an attempt to inhibit or punish the exercise of Plaintiff's First Amendment rights. 140 Midland Avenue is located in a commercial zone in which cabaret entertainment is not allowed. A prior occupant of the premises had obtained a special exception allowing cabaret entertainment between 10:00 p m. and 2:00 a.m, and it was the enforcement of this restriction that Plaintiff challenged.

An understanding of the procedural history of this case is necessary to evaluate Plaintiff's claim that it is a prevailing party (who is) entitled to attorneys' fees. LaTrieste commenced this action on January 18, 1994 and sought a temporary restraining order and/or preliminary injunction enjoining the Village from revoking LaTrieste's certificate of occupancy or otherwise interfering with topless dancing at the Diamond Club. The request for temporary relief was resolved by a stipulation that the Village would not attempt to revoke the Diamond Club's certificate of occupancy until the state court decided an Article 78 proceeding brought by LaTrieste challenging the Village's decision not to grant a variance from the 10:00 p.m. restriction. On February 18, 1994, after a decision adverse to LaTrieste had been rendered in the Article 78 proceeding, LaTrieste again requested interim relief enjoining revocation of its certificate of occupancy and interference with topless dancing at the Diamond Club. This matter was also resolved by a stipulation in which the Village agreed not to take action until the Honorable Charles L. Brieant, to whom the case was then assigned, decided the Village's motion for summary judgment. Judge Brieant granted the summary judgment motion on April 29, 1994 and refused to issue a stay pending appeal to the Second Circuit Court of Appeals. The Court of Appeals issued a stay and vacated Judge Brieant's decision on November 11, 1994, LaTrieste Restaurant & Cabaret, Inc

v. Village of Port Chester, 40 F.3d 587 (2d Cir. 1994). The Village then agreed before the Honorable Barrington D. Parker, Jr., to whom the case had been reassigned, to hold its prosecution of LaTrieste in abeyance pending settlement discussions. On March 15, 1996, the Village notified LaTrieste that it would no longer hold the prosecution in abeyance. LaTrieste again sought a temporary restraining order and/or preliminary injunction. On March 29, 1996, Judge Parker denied interim relief to LaTrieste, finding that it had not shown a likelihood of success on the merits. Despite this ruling, the Village apparently took no further action against LaTrieste prior to the completion of testimony in the bench trial.

Judge Parker granted qualified immunity to the individual defendants, thus precluding LaTrieste from claiming punitive damages. Plaintiff then withdrew its claim for damages, leaving only its claims for a declaratory judgment and injunctive relief.

I conducted a bench trial that concluded on November 20, 1997. In my decision of January 23, 1998, I found that prior occupants of 140 Midland Avenue provided cabaret entertainment prior to 10:00 p.m. and that the 10:00 p.m. restriction was unenforced prior to the opening of the Diamond Club. The restriction was enforced for the first time on the Diamond Club's opening night, and the Village thereafter issued LaTrieste several notices of violation for failure to comply with the 10:00 p.m. restriction. I concluded that the attempts to enforce the restriction during the summer of 1993, when the Diamond Club was a source of considerable controversy in the Village, were made with the intent to inhibit or punish the exercise of Plaintiffs First Amendment rights. In doing so, I considered comments made by then Mayor John Branca, which included statements made to constituents that he would do everything legally possible to stop topless dancing in the Village.

I found that LaTrieste had not proven that any Village

officials other than Branca intended to inhibit or punish the exercise of LaTrieste's rights. I also found that LaTrieste failed to prove that attempts by the Village after the summer of 1993 to enforce the restriction were motivated by an intent to inhibit or punish the exercise of Plaintiff's First Amendment rights I determined only that "the Village engaged in unconstitutional selective enforcement from the period of May 1993 to the late summer of 1993 when the Diamond Club began temporarily complying with the 10:00 p.m. restriction."

Plaintiff requested that the Village be enjoined from pursuing both pending administrative proceedings, stemming from a January 1994 notice of violation, to revoke LaTrieste's certificate of occupancy and "quasi-criminal proceedings" pending in village court based on a May 1994 notice of violation. Assuming for the purposes of the decision that I could enjoin such proceedings, I declined to grant injunctive relief for a number of reasons, including the fact that LaTrieste had offered no evidence about the status of either of these proceedings; the fact that Mayor Branca, who was the only Village official proven to have acted with impermissible intent, was not proven to have any connection to these proceedings; and the fact that Plaintiff had failed to prove that the particular citizen complaints that gave rise to these enforcement efforts were motivated by an intent to inhibit or punish Plaintiffs First Amendment rights.

Plaintiff also requested an injunction preventing the Village from engaging in selective enforcement of the 10:00 p.m. restriction. I denied this request because Plaintiff demonstrated no necessity for injunctive relief given that Mayor Branca, the only individual shown to have acted with intent to inhibit or punish Plaintiffs exercise of its constitutional rights, left office in 1995. I also indicated that I would have denied injunctive relief in any event on an unclean hands theory given that Plaintiff had continued up until trial to operate in violation of a restriction that was held

valid in an Article 78 proceeding in January 1995.

Judgment was entered on February 4, 1999 and read in part "that the plaintiff have declaratory judgment declaring that the Village of Port Chester selectively enforced the 10: 00 p.m. zoning restriction against plaintiff in accordance with the January 23, 1998 Decision, from the period of May, 1993 to the late summer of 1993"

In an action claiming a violation of 42 U.S.C. §1983, the Court, in its discretion, may award attorneys' fees to the prevailing party. 42 U.S.C. §1988. Generally speaking, a litigant is a prevailing party under 42 U.S.C. §1988 when he or she has "prevailed on the merits of at least some of his claims." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam). Prevailing on the merits requires the receipt of some kind of relief Hewitt v. Helms, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. ") "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces." Id. at 761.

Whether a declaratory judgment can render a party prevailing depends on the circumstances. In Rhodes v. Stewart, 488 U.S. 1 (1989), the Court reviewed a grant of attorneys' fees in a case in which two plaintiffs obtained a declaratory judgment stating that prison officials had applied incorrect procedural and substantive standards in denying plaintiffs permission to subscribe to a magazine. By the time the district court made this decision, one of the plaintiffs was dead and the other had been paroled. The Court reversed the grant of attorneys' fees, saying that the judgment obviously benefitted neither plaintiff and observing that, "A declaratory judgment ... is no different from any other judgment. It will constitute relief, for purposes of §1988 if, and only if, it affects the behavior of the defendant toward the plaintiff."

Id. at 4

The formulation of the prevailing party test upon which both parties rely is found in Farrar v. Hobby, 506 U.S. 103, 111-12 (1992). In that case, which addressed an award of nominal damages, the Court held that "A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." See also Texas State Teachers Ass'n v. Garland Independent Sch. Dist., 489 U.S. 782 (1989); Coalition for a Liveable West Side, Inc. v. N.Y.C. Dep't Env. Prot., No. 92 CIV 9011, 1998 WL 299938 (S.D.N.Y. June 9, 1998).

Plaintiff takes the position that the legal relationship between the parties has been materially altered by my determination that the Village selectively enforced the 10:00 p.m. restriction and by my statement that the Village is not entitled to enforce the restriction with the intent to inhibit or punish the exercise of Plaintiffs First Amendment rights.[2]

This statement is a simple summary of governing law rather than an edict. Neither this statement nor the declaratory judgment awarded Plaintiff materially alters the parties' legal relationship. The Village was not entitled to enforce the 10:00 p.m. restriction with an intent to inhibit or punish the exercise of First Amendment rights before, during, or after this litigation. Both parties find themselves in the same legal position they occupied prior to

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[2] Plaintiff also claims that its legal relationship to the Village has been materially altered because, in future actions, the burden will be on the Village to prove that its enforcement of the restriction is not motivated by a desire to inhibit or punish protected speech. Although Plaintiff made this argument in its post-trial brief, I did not decide this issue. Putting aside the fact that I have reservations about the legal merit of this argument, it was neither necessary nor desirable for me to decide the burden of proof in potential future litigation that might well take place before another court.

commencement of this case. Plaintiff failed to obtain injunctive relief that would have materially altered the parties' legal relationship. See LeBlanc-Sternberg v. Fletcher,---- F.3d ----, 1998 WL 248641 (S.D.N.Y May 13, 1998).

I also note that the declaratory judgment in this case was narrow. Plaintiff proved only that the Village engaged in selective enforcement during the summer of 1993. I held that Plaintiff had not proven that enforcement efforts in 1994 were unconstitutionally motivated. Thus the declaratory judgment did not apply to pending enforcement attempts. There was no indication that unconstitutional conduct was likely to recur. See LaGrange Trading Co. v. Broussard, No. A 90-2306, 1993 WL 188672 (E.D.La. May 25, 1993) (adult bookstore not entitled to attorneys' fees when Court held that amendment to zoning ordinance was constitutional with the exception of a special permit requirement. The city was entitled to, and did, force Plaintiff to relocate under the valid provisions of the law.) Cf. Putnan v. Davies, 960 F. Supp. 1268 (S.D. Ohio 1997), affd ---- F.3d ----- 1998 WL 344075 (6th Cir. May 26, 1998) (awarding attorneys' fees when plaintiffs obtained declaratory judgment alone. The Court declined to issue a permanent injunction solely because it assumed that law enforcement personnel would not attempt to enforce a statute that had been held unconstitutional).[3]

Plaintiff also argues that I should at least award it attorneys' fees for obtaining settlements of its repeated preliminary injunction applications. These agreements were in effect between January 1994 and March 1996. LaTrieste

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[3] Had Plaintiff not withdrawn its claim for damages, it likely would have been entitled to nominal damages. Under such circumstances, the only reasonable fee would have been no fee. Farrar v. Hobby, 506 U.S. 103 (1992).

correctly observes that attorneys' fees are available for obtaining a preliminary injunction under certain circumstances. The question of whether the settlement of a request for a preliminary injunction entitles a party to attorneys' fees is a different question altogether.

Obtaining temporary relief entities a party to attorneys' fees under 42 U.S.C. §1988 only when the decision to grant such relief is made on the merits. See Haley v. Pataki, 106 F.3d 478 (2d Cir. 1997). Interim relief that serves only to maintain the status quo, such as a temporary restraining order, does not render a litigant a prevailing party. Smith v. Thomas, 687 F.2d 113 (5th Cir. 1982). This principle applies even when the delay occasioned by the temporary relief leads to a desirable outcome for plaintiff LaRouche v. Kezer, 20 F.3d 68 (2d Cir. 1994) (plaintiffs granted injunction pending appeal to the Second Circuit Court of Appeals were not prevailing parties despite the fact that during the pendency of the appeal plaintiffs were, as they had demanded, placed on the ballot).[4]

The stipulations entered into by the Village plainly do not amount to a determination on the merits. In fact, when the Village would no longer stipulate to hold the proceedings in abeyance, Judge Parker denied LaTrieste's preliminary

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[4] The instant case differs from the usual application for attorneys' fees based on obtaining interim relief insofar as here Plaintiff ultimately obtained a declaratory judgment. However, the events that formed the basis for the declaratory judgment were not proven by LaTrieste to be related to the actions that LaTrieste sought to enjoin from 1994 to 1996. As I have observed, LaTrieste failed to prove that intent to inhibit or punish the exercise of First Amendment rights animated the Village's enforcement attempts after the summer of 1993. I reject the theory that plaintiff should be awarded attorney's fees because it obtained two types of relief - a declaratory judgment and a temporary cessation of enforcement efforts-either of which standing alone would be insufficient to render it a prevailing party.

injunction request on the grounds that it had not shown a likelihood of success on the merits.

I have considered and rejected the argument that Plaintiff can recover attorneys' fees for the settlements of its requests for temporary relief under a catalyst theory. Attorneys' fees are available under a catalyst theory when a defendant changes his or her conduct under pressure of a lawsuit. Marbley v. Bane, 57 F.3d 224, 234 (2d Cir. 1995). Specifically, attorneys' fees are warranted when there is a causal connection between the lawsuit and voluntary relief provided by the defendant, provided that the defendant acted as it did because of the threat of victory rather than the threat of nuisance and expense. Id. This theory is commonly employed when a lawsuit induces a defendant to alter regulations that were the subject of the litigation. Plaintiff has pointed to no case in which attorneys' fees have been granted because a plaintiff obtained a settlement that promised an explicitly temporary cessation of enforcement efforts. In the absence of precedent for such a use for the catalyst theory, I decline to apply it in this case.[5]

As the foregoing makes clear, the procedural history of this case is unique. Furthermore, the determination as to whether Plaintiff is a prevailing party is complicated by the nature of a selective enforcement action, which by definition involves a valid regulation. Here, Plaintiff has acknowledged that the Village is entitled to enforce the 10:00 p.m. restriction unless it does so with the intent to inhibit or punish the exercise of constitutional rights. Plaintiff has

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[5] I also note that the Second Circuit Court of Appeals' reversal of Judge Brieant's grant of summary judgment does not render Plaintiff a prevailing party. A denial of summary judgment obviously indicates only that genuine issues of material fact exist and does not determine the merits of a case. See Hanrahan v. Hampton, 446 U.S. 754 (1980) (per curiam) (reversal of directed verdict does not make one a prevailing party)

been aware of this principle since the state court decided against LaTrieste in the Article 79 proceeding in 1995 and, in fact, Plaintiff represented in writing prior to the opening of the Diamond Club that it would abide by the 10:00 p.m. restriction. Vincent Sorrano, one of LaTrieste's principals, acknowledged at trial that after a short period of compliance with the restriction in 1993 the Diamond Club resumed operating before 10:00 p.m. because it could not survive financially if it did not do so. At the time of trial, the Diamond Club was opening at noon Monday through Friday and at 5:00 p.m. on weekends. The fact is that Plaintiff erred in locating its cabaret in a zone that prohibited cabaret entertainment. Ironically, were it not for the restriction imposed by the special exception about which Plaintiff complained, the Diamond Club would be prohibited from offering topless dancing altogether by virtue of its location in a zone that does not allow cabaret entertainment.

As it happened, the Village chose not to enforce the restriction during the time that this action was pending. During that time, Plaintiff operated in violation of a valid restriction that it found to be financially onerous and made significant profits in the process. Although Plaintiff thereby achieved its goal of avoiding enforcement of the restriction for as long as possible, this outcome has not materially altered the parties' legal relationship. Accordingly, Plaintiffs application for attorneys' fees pursuant to 42 U.S. C. §1988 is denied.

SO ORDERED.

Dated. July 22, 1998
White Plains, New York

MARK D. FOX
UNITED STATES MAGISTRATE JUDGE